A HISTORIC SURVEY

OF

INTERNATIONAL ARBITRATION.

(*From the* NORTH AMERICAN REVIEW.)

GREAT BRITAIN having been invited to submit to arbitration the claims of our Government for damages done to the commerce of the United States by the "Alabama" and vessels like her, the subject of arbitration between nations is invested with new interest. Is arbitration a new or an old method of settling international differences? What rules govern the parties to it? What disputes have been referred, and with what results? These and other questions are suggested as we read the correspondence between the diplomatic representatives of the two countries.

WRITERS ON ARBITRATION.

Those books to which we commonly go when in doubt on questions of international law help us little. They all speak of arbitration as one method by which international difficulties are settled; Wheaton and Hallack dismiss the subject with a section, Phillimore and Twist with a few pages. When we look through these volumes, we are struck by the fact that they devote so many chapters to the rules of war, and have so little to say of peaceful umpirage. But war needs to be restrained. Belligerents cannot injure each other unless they do it by rule, and they cannot injure neutrals unless for violation of rules. War, then, is governed by law, and so also is arbitration. Both war and arbitration consider in theory that all nations are equal, with the same rights and the same duties. When war attempts to enforce these equal rights and duties, it expects to succeed,

because nations are unequal in might. To reconcile a theory so inconsistent with the practice, war requires many rules both for the protection of the parties and of neutrals. Arbitration needs no rules for this purpose, for it regards nations as equal both in right and might. Arbitration, settling international disputes by a method known to individuals, is governed by rules found in the common and civil law ; while war, employing its own peculiar means, needs its own peculiar laws. For this reason the writers on international law have laboured principally to define the *leges belli,* and have given but little space to the laws of arbitration.

"An arbitrator is a person selected by the mutual consent of the parties to determine the matters in controversy between them, whether they be matters of law or fact."

An arbitrator "is a person authorised by the parties in difference to decide what shall be done with regard to the matters submitted to his judgment."

The above are definitions, one from Russell on Arbitration, and the other from Wildman on International Law. In the first quotation the parties are men, and in the second they are nations. The consent in one case is shown by a writing known as the submission; stating the matter in controversy and the points on which the decision of the arbitrator is desired. A treaty, or convention, in which the parties agree to be bound by the award of an arbiter in certain matters of difference between them, gives the authority named in the second definition. Nations may submit any questions they choose to whomsoever they choose. When they have submitted any question, and the award has been given, that award must be conclusive.

"Although the civil law may decide upon the conduct of arbitrators to whom a compromise is referred, so as to allow an appeal from their decision or complaints against their injustice, this can never take place between kings and nations. For here there is no superior power that can rivet or relax the bonds of an engagement. The decree, therefore, of such an arbiter must be final and without appeal."*

These are the words of Grotius, and would seem to indicate that a nation would never be justified in refusing to accept the conclusions of an arbitrator; but later writers state distinctly that no State is bound by an award presenting a clear departure from the terms of the reference, an absolute conflict with justice, or resulting from fraud and connivance.

* Grotius, Book III. Chap. 20.

An arbitrator, as known to nations, need not be a monarch, or possessed of any political power, nor is it necessary that the power to award should be in one person. We shall find that three methods of arbitration have been practised. Some nations have settled their disputes by referring them to a congress made of representatives from each nation, as the Greek cities in some instances referred matters in dispute to the Amphictyonic Council, and abided by its decision. Others have trusted their differences to the chief of some friendly nation, as when the United States and Great Britain invited the King of the Netherlands to settle a line of boundary. And others have preferred the award of a commission composed of an equal number of citizen arbitrators chosen by each State, and an umpire selected by lot or agreement, or, in later cases, appointed by some friendly sovereign, like the commission which recently sat in Washington to settle claims between our Government and Columbia.

Arbitration, as a means of preventing war, has long been practised. Grotius says: "'Tis barbarous and abominable to fall upon him as an enemy who is willing to put his case to reference."* And he then reminds us that the Greeks and Romans submitted to the opinion of an arbitrator, and that even Cyrus, Philip of Macedon, and Pompey desired to have an award. Strabo writes, that in former times the Druids in Gaul were the umpires between nations at war, and had often accommodated matters upon the point of an engagement. A treaty between the Lacedæmonians and the Argives provided that, if any dispute should happen between two States in alliance, they should refer their cause to some other State that was indifferent to them both.

Bynkershoek wrote only of the law of war, and so gave us no method to avoid it. In Vattel we read that arbitration is a method very reasonable, and very conformable to the law of nature, in determining all differences that do not directly interest the safety of a nation.†

Grotius wished something more than that the future writer on international law should be able, as he had done, to chronicle individual cases of successful arbitration. He advised that nations should unite in sending representatives to a general congress, which should settle whatever differences arose between the States represented. For such a proposition he was thought

* Book II. Chap. 23, sec. 8. † Book II. Chap, 18, sec. 392.

rash and visionary; but this plan was not without its advocates. In France, during the next century, Nicole, and later, the Abbé Saint Pierre and Rousseau, advocated plans for universal peace. In Germany, Leibnitz, Kant, and Fichte seconded the suggestions of the French philosophers; while Penn and Jeremy Bentham, in England, endeavoured to cause nations, like individuals, to settle their difficulties by right, not might. Whether or not the plan for a Congress of Nations would be a practicable one, it is not our present purpose to inquire; and we have only considered it so far, that we might show the form which the idea of arbitration took among writers till about the time of our Revolution.

More Modern Proposals on the Subject.

We find that our fathers had no sooner ended the war which had been forced upon them, than they began to talk of the advantages of settling international difficulties by some more satisfactory method. Jefferson asked: "Will nations never devise a more rational umpire of differences than force? War is an instrument entirely inefficient towards redressing wrongs, and multiplies instead of indemnifying losses." Madison expressed the same thought. Franklin, having asserted that there never was a good war or a bad peace, asks, "When will mankind be convinced of this, and agree to settle their difficulties by arbitration?" In an address of Mr. Sumner, delivered before the American Peace Society on its anniversary in 1849, we find a letter of Samuel Adams written to the delegates in Congress from Massachusetts, at some time before 1789. It is in the form of a letter of instructions.

> "You are, therefore, hereby instructed and urged to move the United States, in Congress assembled, to take into their deep and most earnest consideration whether any measures can by them be used, through their influence with such of the nations in Europe with whom they are united by treaties of amity or commerce, that national differences may be settled and determined without the necessity of war, in which the world has too long been deluged, to the destruction of human happiness and the disgrace of human reason and government."

It does not appear that this letter led to any legislative act, but the words quoted show how strongly one of the leading minds of the country desired to substitute arbitration for war.

With such men directing the policy of the new State, we are not surprised to find that various questions between the United

States and Great Britain, France, and Spain were referred to commissioners, by whose award the parties agreed to abide. Several cases of arbitration occurred before 1812, when came the war with Great Britain to decide a question which after the war was still undecided; for the Treaty of Ghent said not a word about the right of impressment, though it provided that certain claims existing before the war, together with some questions of boundary, should be referred to different boards of commissioners. Though the United States were thus enabled to settle some disputes, yet all the friends of peace were not satisfied. By the efforts of Noah Worcester, William Ellery Channing, William Ladd, and others like them, the idea contained in the letter of Samuel Adams was kept before the people.

In 1828 several small societies united to form the American Peace Society. The members of this society desired to bring about a Congress of Nations, to which all differences between nations should be referred. As they did not expect to accomplish this general congress at first, they laboured to induce the government to settle each particular difficulty, as it arose, by arbitration. To give legislative sanction to their endeavours they petitioned Congress; and in the session of 1837-38, Mr. Legaré reported from the Committee on Foreign Affairs in the House of Representatives, "recommending the reference to a third power of all such controversies as can safely be confided to any tribunal unknown to the constitution of our country. Such a practice will be followed by other powers, and will soon grow up into the customary law of civilised nation."

Peace Congress.

But not alone in the United States were the advocates of peace at work. A Peace Society had been formed in London in 1816; similar societies afterwards came into existence in France and Germany, and the representatives of these and other societies held a Peace Congress at Brussels in 1848.

The following resolution was passed by this Congress:—

"It is of the utmost importance to urge upon the different governments of Europe and America the necessity of introducing into all international treaties an arbitration clause, by which war shall be avoided in the settlement of disputes." In this resolution we have embodied what is known as stipulated arbitration. Mr. Cobden wrote to the President of this meeting, "I

most heartly approve of this proposition;" for which he recommended a separate treaty.

In this same year the United States House of Representatives again considered this question. In 1849, another Peace Congress, held at Paris, declared that it was "the duty of all governments to submit to arbitration all differences that arise between them." At a third Congress, held at London in 1851, it was resolved, "that it is the duty of governments to refer to the decision of competent and impartial arbitrators such differences arising between them as cannot be amicably settled."

These last resolutions only advised arbitration in individual cases; but the friends of peace in the United States went further, and each year presented petitions asking for stipulated arbitration.

The United States' Senate on Arbitration.

Mr. Foote, Chairman of the Senate Committee on Foreign Relations, said in the Senate, in 1851, that Arbitration, as a system, was perfectly reasonable, and presented the unanimous report of the Committee, "that it would be proper and desirable for the Government of these United States, whenever practicable, to secure, in its treaties with other nations, a provision for referring to the decision of umpires all misunderstandings that cannot be satisfactorily adjusted by amicable negotiation, in the first instance, before a resort to hostilities shall be had."

From another long and very able report from the same Committee, by Mr. Underwood, in 1853, we make an extract which is also valuable for its opinions on some questions to be hereafter considered :—

"All that the Committee are willing to advise and recommend for the present is, that, in the treaties which are hereafter made with foreign nations, it shall be stipulated between the contracting parties that all differences which may arise shall be referred to arbitrators for adjustment. Under such stipulation, the board of arbitrators, or the single arbitrator, would be selected after the occurrence of the difficulty. Each party would be careful to select impartial persons, distinguished for their virtues and talents, and each would have the opportunity of objecting to anyone proposed who might not possess these high qualifications. In the opinion of the Committee, the arbitrators should be eminent jurists, having little or no connection with political affairs."

Several of the State legislatures had passed resolutions instructing their Senators to favour stipulated arbitration; and there is no doubt that, if a treaty embracing a provision to this effect had been presented to the Senate, it would have been

ratified by them. At this very time a treaty was pending with Great Britain, and the President and Secretary of State expressed their willingness to insert such a proposition if the British Minister would assent to it; but though Mr. Crampton intimated that he would be glad to put his name to such a treaty, yet for some reason, when the treaty was ratified by the Senate, there was no article providing for the submission of all differences between the parties to a board of arbitrators, but only of those which should arise under the treaty.

Mr. Cobden's Motion in 1849.

The British Government were not so favourably inclined to stipulated arbitration as was the Government of the United States, as appears from the report of a debate in the House of Commons, on June 12th, 1849, when Mr. Cobden moved :—

"That an humble address be presented to her Majesty, praying that she will be graciously pleased to direct her principal Secretary of State for Foreign Affairs to enter into communications with foreign powers, inviting them to concur in treaties binding the respective parties, in the event of any future misunderstanding which cannot be arranged by amicable negotiation, to refer the matter in dispute to the decision of arbitrators."

In opening the debate Mr. Cobden said :—

"By arbitration I do not mean necessarily crowned heads or neutral States. I do not confine myself to the plan of referring disputes to neutral powers. I see the difficulty of two independent States like England and France doing so, as one might prefer a republic for an arbitrator, and the other a monarchy. I should prefer to see these disputes referred to individuals, whether designated commissioners or plenipotentiaries, or arbitrators appointed from one country to meet men appointed from another country, to enquire into the matter and decide upon it; or, if they cannot do so, to have the power of calling in an umpire, as is done in all arbitrations. I propose that these individuals should have absolute power to dispose of the questions submitted to them."

To show that his plan is practicable, he cites successful instances of arbitration between the United States and England, and then goes on to strengthen his position by argument, answering by anticipation the objection that a treaty by which two nations agreed to arbitrate all their disputes would be violated. He finds no more difficulty in trusting individuals as arbitrators than as negotiators.

Lord Palmerston, then Secretary of State for Foreign Affairs, after some debate by other members, spoke at length, maintaining that private individuals were even less to be trusted than

crowned heads, and that the cases cited by Mr. Cobden were insufficient to prove the plan practical. In conclusion he said :—

"I do not quarrel with the principle upon which the proposition is founded; but I think its practical effect would be dangerous to this country, and that its practical adoption by other countries would be impossible. Indeed, I believe that no country would agree to such a proposal. No country would consent blindfold to submits its interests and rights on all future occasions to the decision of any third party, whether public or private, whether governments or men of science; and I think, therefore, the proposition is one which would be attended with no possible result as regards foreign countries."

He then showed that such treaties would be likely to be especially unjust and injurious to England. To avoid a direct negative on the proposition, the Foreign Secretary then moved the previous question, which, when lost, is by custom of the House of Commons equivalent to an indefinite postponement.

Before the question was put, Lord John Russell spoke in opposition to the proposition of Mr. Cobden; and that we may compare his position then with that now taken in regard to the "Alabama" claims, we quote as follows :—

"I think there may be some questions intricate and difficult in themselves, in which neither party may be willing to give way, but in which either party may give way without any sacrifice of honour or of the vital interests of the country. On such a question it may be very fit that two powers should agree that arbitration should be resorted to. But, on the other hand, there are other questions that occur between nations, that cannot well or fitly be submitted to arbitrators,—questions involving the dearest interests, the honour or safety of a country, which, if a government proposed to submit to an arbitrator, the force of public opinion and popular feeling would render it impossible for the government to carry out such a purpose."

In regard, however, to the difficulties which caused the war of 1812, he says:—"There were grave and serious questions, which, if ever they were to be brought into dispute again, might be arranged by arbitration."

On the vote the previous question was lost by a vote of 79 to 176, and so the subject rested.

French Movement.

In France there was also a movement in favour of arbitration. A proposition was made in the National Assembly during this same year, 1849, that the French Republic should propose to the Governments of Europe and America to unite by their representatives in a congress which "should substitute an

arbitral jurisdiction for the barbarous usage of war." The committee on Foreign Affairs, having considered the question, declined for the time to recommend the proposition, though they distinctly sanctioned its object. Thus we see that in the United States, Great Britain, and France, a considerable movement had been made in favour of arbitration.

Diplomatic Congress of Paris, 1856.

The next step in the matter was taken in 1856 by the Congress of Paris, at which all the great States of Europe were represented. The twenty-third article adopted by the Congress was in the following terms :—

"The plenipotentiaries do not hesitate to express, in the name of their governments, the wish that States between which any serious misunderstanding may arise should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly power."

This article was proposed by Lord Clarendon, now her Majesty's Secretary of State for Foreign Affairs. Count Walewski, speaking in behalf of France, said that it was fully in accordance with the tendency of the epoch. If we rightly understand the debate and the resolution, they advise, not mediation, but arbitration. A mediator gives his advice, and the parties may or may not accept it. An arbitrator gives his opinion by which two nations have agreed to be bound. "Good offices" is the phrase commonly used to express the offer made by the mediator; but here the plenipotentiaries advice that nations should have recourse to the good offices, that is, should agree to abide by the opinion of a mediator invited to settle their differences. Between such mediation and arbitration there is little or no difference.

American Proposal.

Even now, as we write, a petition from the American Peace Society is on its way to Washington, praying that the United States propose to other nations that measures be mutually taken with a view to calling a grand convention or Congress of Nations, "for providing," among other objects, "a general tribunal, composed not of princess and sovereigns, but of distinguished citizens of the different countries, as a High Court of Arbitration, to whom may be referred all disputes arising

between the contending parties." If our Congress shall have time to consider this petition with the attention it deserves, and shall legislate to carry out its object, Great Britain will hardly be able to refuse to join in an international court of arbitration before which the other great powers of the earth shall have agreed to present their differences; for, though the Peace Society of London has been mourning for one of whom they say "no man ever sympathised more earnestly with our aspirations and aims, and no man in this country, or in any other country, ever contributed so much to the object we have in view,"—though Cobden is dead, John Bright and other advocates of peace survive, and will insist that England shall not demand war, when all other nations are asking for peace.

Instances of Arbitration.

Having now seen that the idea of submitting the difficulties which arise between nations to arbitration is nothing new, but that from early times arbitration has been practised under a variety of forms, and that at no other time has there been so much general interest in the subject as now, we are ready to consider individual instances in which international differences have been referred to arbitrators. For this purpose our own history furnishes sufficient material. The questions in dispute, the manner of the submissions, and the results, will deserve attention.

French and American Claims.

All the claims that have arisen between France and the United States have been settled by negotiation. By the Treaty of 1803, which ceded Louisiana to the United States, our Government became responsible for debts due by France to our citizens. In 1831 a convention was signed which provided that France should pay twenty-five million francs to the United States for unlawful seizures, captures, and sequestrations.

Spain and America.

By the first treaty* between Spain and the United States it was agreed that, in order to terminate all differences on account of the losses sustained by the citizens of the United States in

* Elliot's Am. Dip. Code, Vol. I. p. 390.

consequence of their vessels and cargoes having been taken by the subjects of Spain, all such cases should be referred to a board of three commissioners, one to be chosen by each party, and the third by agreement of the other two, or by lot. The commissioners were bound by oath to impartially examine and decide the claims in question, "according to the merits of the several cases, and to justice, equity, and the law of nations." It is probable that this commission met, but we have been unable to find the records. In 1802 another convention was framed, providing for a commission to settle claims "which have arisen from excesses committed during the late war by individuals of either nation, contrary to the laws of nations or the treaties existing between the two countries." * A very full and interesting correspondence, which ensued before this treaty was ratified by Spain in 1818, will be found in the first four volumes of the American State Papers. The commission under this treaty never met; for in 1819 another treaty was entered into, but which Spain ceded Florida to the United States, and each nation gave up certain classes of claims against the other; the United States becoming responsible to her citizens for five millions of dollars.† The correspondence in reference to the different claims given up shows that each nation considered itself responsible for claims similar to those for which England now refuses compensation to the United States.

United States and Great Britain.

And now we come to consider what questions have been left by the United States and Great Britain to the decision of an umpire.

The definitive Treaty of 1783 had only been in force eleven years, when it became necessary that a new treaty should be entered into which should provide for the settling of differences between the parties. The river St. Croix formed the part of our north-eastern boundary in accordance with the first treaty, but a difference arose as to what river was the St. Croix. The fifth article of the Treaty of 1794 provided that this question should be left to three commissioners, one chosen by each nation, and the third by agreement or lot. A commission formed in this way came to a conclusion which was accepted by both sides.

* Elliot's Am. Dip. Code, Vol. I. p. 411.
† Ibid. p. 415.

By the sixth article of the same treaty it was agreed that the United States should compensate British creditors for all losses occasioned by legal impediments to the collection of debts contracted before the peace of 1783, which a commission, appointed as this last, except that each side selected two members, should award to be just. This commission met at Philadelphia.

Under the seventh article, another board of commissioners, formed like this last, met at London. They were empowered to decide all claims of the citizens of the United States for illegal captures of their vessels by British subjects. Before this same commission came also all claims to be paid by the United States to British subjects for losses sustained by captures made by French privateers fitted out in our ports before President Washington had used all the means in his power to prevent such equipment. Neither of these commissions could agree as to the choice of fifth commissioner. At Philadelphia the choice by lot fell to the British ; at London, Mr. Trumbull, an American, was chosen in the same way.

Claims to the amount of twenty-four millions of dollars were filed at Philadelphia, many of them by expatriated Tories; but, before a single claim had been definitively adjudicated, the American commissioners withdrew, by the approbation of their Government. The British commissioners demanded that the United States should prove that there had been no legal impediments, while our commissioners insisted that the British claimants should show that there had been impediments. The question then was merely upon which party should rest the burden of proof. The other commission had been more successful. Christopher Gore and William Pinkney were the American commissioners. They were met by Dr. Nicholl and Dr. Swabey on the part of Great Britain, and were proceeding in their settlement to the satisfaction of each party, when the news came that the American commissioners had withdrawn from Philadelphia, and the British representatives retired immediately from the London commission. It is not easy to discover now on which side the responsibility of this rupture should be placed. Mr. Pinkney, writing from London to a friend, says : "The commission in America has been wretchedly bungled ; I am entirely convinced that, with discretion and moderation, a better result might have been obtained." And, complaining that he must stay longer in Europe, he adds, "So much for the

mismanagement and folly of other people." * After two years' negotiation, the United States, by a convention, agreed to pay and Great Britain agreed to take less than three millions of dollars in full satisfaction of their claims for twenty-four millions.† While, then, with Mr. Pinkney, we feel that the commission was not prudently managed, we yet cannot but think that the United States might justly ask to be relieved from the necessity of proving seven-eights of all the claims presented by Great Britain to be without foundation.

By the same convention which settled all claims under the sixth article of the Treaty of 1794, the commissioners under the seventh article reassembled, and went on with their awards. Their proceedings have never been published in full. Some of Mr. Pinkney's decisions will be found in the second part of Wheaton's "Life of Pinkney;" other decisions will be found in the text-books of international law. In little more than a year after their reassembling they closed their labours, having awarded to American merchants about six millions of dollars, which was duly paid by the British Government, after deducting the amount at which the British claims were liquidated, and some small awards to British claimants for captures made by French privateers in American waters.

The different result of these two commissions teaches how important it is that wise and prudent men should be selected as commissioners; for many a difference, which would break up a commission of mere partisans, would be quietly settled by the good counsel of fair minds.

Emperor of Russia's Award in 1822.

We come now to a successful settlement by arbitration of an international difficulty, which will be best understood if we quote the fifth article of the Convention of London in 1818.

"Whereas it was agreed, by the first article of the Treaty of Ghent, that all territory, places, and possessions whatsoever, taken by either party from the other during the war, or which may be taken after the signing of this treaty, excepting only the islands hereinafter mentioned, shall be restored without delay, and without causing any distruction, or carrying away any of the artillery or other public property originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty, or any slaves or other private property; and whereas, under the aforesaid article, the United

* Wheaton's Life of Pinkney, p. 35.
† Elliot's Am. Dip. Code, Vol. I. p. 266.

States claim for their citizens, and as their private property, the restitution of, or full compensation for, all slaves who, at the date of the exchange of the ratificaton of the said treaty were in any territory, places or possessions whatsoever, directed by the said treaty to be restored to the United States, but then still occupied by the British forces, whether such slaves were, at the date aforesaid, on shore or on board any British vessel lying in waters within the territory or jurisdiction of the United States; and whereas differences have arisen, whether, by the true intent and meaning of the aforesaid article of the Treaty of Ghent, the United States are entitled to the restoration of, or full compensation for, all or any slaves as above described, the high contracting parties hereby agree to refer the said differences to some friendly sovereign or State, to be named for that purpose; and the high contracting parties further engage to consider the decision of such friendly sovereign or State to be final and conclusive on all the matters referred."*

The Emperor of all the Russias was selected as arbitrator; and the plenipotentiaries of the two parties declared that it was *upon the construction of the text of the article as it stood* that his decision should be founded, and that they appealed only as subsidiary means to the general principles of the law of nations and of maritime law. Therefore, looking only at the literal and grammatical sense of the article, the Emperor held that the words "*originally captured, and which shall remain therein upon the exchange of the ratification,*" formed an incidental phrase, which could have respect grammatically only to the substantive or subjects which precede, viz., to public property. He held, further, that the carrying away of any private property whatever was forbidden; and again, that these two prohibitions applied only to the places of which the article stipulated the restitution.† This award, given in 1822, was at once accepted, and the good offices of the Emperor were further invoked to assist in framing such articles of agreement as should provide for the mode of ascertaining and determining the value of the slaves taken. His Majesty assented, and appointed Count Nesselrode, Secretary of State directing Foreign Affairs, as his agent, and with his assistance the plenipotentiaries of the two parties concluded the Convention of St. Petersburgh. By this convention it was agreed that each party should nominate one commissioner and one arbitrator, who should solemnly swear to diligently, impartially, and carefully examine, and to the best of their judgment, according to justice and equity, decide all matters submitted to them under the convention. If the average value to be allowed for each slave could not be determined by the two Governments, then the board of commissioners, having

* Elliot's Am. Dip. Code, Vol. I. p. 382. † Ibid. p. 298.

heard testimony, should fix such value; and, if they could not agree, it was provided that recourse should be had to the arbitration of the minister or other agent of the mediating power accredited to the Government of the United States, whose decision, founded on the evidence already presented to the board, should be final and conclusive. It was agreed by another article, that, the average value having been determined, the commissioners should constitute a board for the examination of all claims contained in a definite list furnished by the Secretary of State. If the commissioners agreed, their decision was final; but if they could not agree, they drew by lot the name of one of the two arbitrators, who having consulted with the commissioners, a final decision was given conformably to the opinion of the majority of the new board.*

The convention met at Washington, and determined on the average value of the slaves to be compensated for, but could get no further. There were claims for some three thousand slaves, besides claims for a large amount of other property which had been taken by the British. The selection of commissioners may have been unhappy; at any rate, the attempt at settlement was a failure. Mr. Clay, writing of it to our minister at London, says :—

"Experience has fully developed the practical inconvenience of submitting all interlocutory points, every preliminary question about the form of trial, the authentication of evidence, its effect, and the rules of proceeding. If the settlement of one question settled the whole class to which it belonged in all analogous cases, the evil, which then would be still great, might be borne. But, unfortunately, the very same question (the sufficiency, for example, of the authentication of a deposition) may arise in different cases, and be determined according as the lot for the arbitrator may be cast. And thus it may, and mostly will, happen that the proof of the claim of one individual will be rejected, under precisely the same circumstances of those of another which will be received and allowed."

This difficulty existed in the terms of the submission; but the refusal of the British commissioner to refer certain questions that arose in regard to interest and other matters broke up the commission.† After some negotiation it was stipulated by a treaty in 1826 that Great Britain should pay to the United

* Elliot's Am. Dip. Code, Vol. I. p. 284.

† William Wirt, then Attorney-General of the United States, gave his opinion that interest, according to the usage of nations, is a necessary part of the indemnification awarded by the Emperor of Russia; and that the refusal of the British commissioner to call in an arbitrator to decide the question of interest was wholly unwarranted by the convention.—Am. State Papers, Vol. VI. p. 950.

States twelve hundred and four thousand dollars in full and complete satisfaction of all claims.* From this time the claimants looked directly to the United States for their compensation.

Boundary Claims.

The second of the provisional articles which were signed in 1782 by the commissioners of Great Britain and the United States, and which declared that the United States were free, sovereign, and independent States, fixes their north-eastern boundary in these words:—

"From the north-west angle of Nova Scotia, viz., that angle which is formed by a line drawn due north from the source of the St. Croix River to the highlands which divide those rivers that empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean, to the north-westernmost head of the Connecticut River; thence down along the middle of that river to the forty-fifth degree of north latitude." †

It is probable that the same boundary line was meant by each of the commissioners, and so clearly defined was it thought to have been, that the next year, when a definitive treaty was entered into by the same parties, the same words of boundary are used, in order "that all dispute in future on the subject of the boundaries of the said United States may be prevented. We have already seen that at the end of five years the St. Croix River was fixed by the decision of the commissioners under the Treaty of 1794.

Twenty years pass by, and at the close of another war this whole line is undetermined. What highlands are meant? In what pond does the Connecticut rise? Where is the forty-fifth degree of north latitude? These were the questions to which each party had a different answer.

While drafting a treaty which terminated a war that had settled nothing, it was not strange that each party should desire to determine other questions in some method at once more just and less costly in life and treasure; and so we find in the Treaty of Ghent that provision is made for three distinct commissions to decide different questions of boundary.‡ Each government agreed to appoint one commissioner, who together should examine the question, and try to arrive at a decision which the parties should consider as final; but if for any reason the commissioners could not come to the same conclusion, it was further

* Elliot's Am. Dip. Code, Vol. I. p. 306. † Ibid., p. 226.
‡ Ibid., p. 268.

stipulated that their report should be referred to some friendly power, or State, by whose decision the parties should be bound.

The commissioners appointed under the fourth article to decide to which government belonged certain islands in Passamaquoddy Bay, agreed in a decision, as did those under the sixth article, appointed to fix the boundary line from Lake Champlain to Lake Huron; but those under the fifth article, whose duty it was to determine what was meant by that part of the boundary line described in the words already quoted, found that they could agree on nothing. To carry out the provision of the treaty, a convention was signed at London, fixing the manner of the submission.* As the reports and documents of the commissioners were voluminous and complicated, it was thought best to substitute new and separate statements of the respective claims, severally drawn by each of the contracting parties, and to be mutually communicated to each other within a certain time. As a reply to these communications each party had the right to draw up a second and definite statement, which was also to be communicated. Other articles of the convention provided that certain maps should be mutually acknowledged, that the statements should be jointly and simultaneously delivered up to the arbitrator, and that, if he should desire further elucidation or evidence he might make requisition upon both of the parties.

The King of the Netherlands was chosen arbitrator, and in 1831, after having duly examined and maturely weighed all the evidence, he made known his award, deciding definitely as to the north-westernmost head of the Connecticut, but considering that the evidence on either side was not sufficiently preponderating to determine the difference as to the highlands; that, as the nature of the difference and the vague and indeterminate stipulations of the Treaty of 1783 did not permit a just settlement of the conflicting claims of the parties in regard to the line of boundary, and as no fresh topographical investigation could further elucidate the question, he gave his opinion that it would be suitable to adopt as the boundary between the two States a line which he proceeded to establish. He was further of the opinion, that it would be suitable to undertake fresh operations to determine the forty-fifth degree of north latitude.†

* Elliot's Am. Dip. Code, Vol. I. p. 315. † Ibid., p. 320.

This award was given on January 10th; and on the 12th, Mr. Preble, our envoy at the Hague, protested against it, because the arbiter "abandoned the exceedingly definite and lucid description of boundary in the treaty, and substituted a distinct and different line of demarcation." The English government desired to stand by the award, and the United States would probably have done so, but for the objections of the State of Maine. Mr. Preble was a native of this State, and we are consequently not surprised to find that the award was discussed and rejected in secret session by the Legislature of Maine, even before it was received at Washington. The Legislature declared the award null and void: first, because the United States had no right to determine what should be the boundary of the State of Maine; secondly, because the arbitrator was not King of the Netherlands when the award was given, having lost part of his possessions; and lastly, because he only gave his advice, and did not say distinctly what was the true line.

This first objection was in no ways material, if the award had been decisive; the second should have been made, if at any time, before the award; and the third, according to the rules of arbitration at common law, was perhaps valid, and we shall consider it further.

Massachusetts, interested as the original proprietor of the State of Maine, also remonstrated.

Great Britain tried to hold the United States to the award under that clause of the convention which declared that the award of the arbiter should be final and conclusive. The President sent the award to the Senate, advising that it should not be accepted. The Committee on Foreign Relations, to whom the matter was referred, reported favourably. But after the committee had reported, the agents of Maine used every means to prevent the adoption of the report by the Senate, and they were successful. It is not our purpose here to criticise the action of Congress, or to discuss the question of the authority of the Senate in the matter, but only to show that the President and Senate did not consider the award as binding, because it was but the advice, and not the decision of the King of the Netherlands. If the award had been of the proper character it would not have required the assent of the Senate, for such assent had been given when the convention was ratified, nor would the first objection of the Maine Legislature have been good; for though they might object that a part of their terri-

tory should be given up as a compromise when the United States claimed the whole, they could not have objected to an award which simply determined what the boundary line was, and had been when the whole territory belonged to the United States.*

Our government, thinking that the King of the Netherlands failed to come to a definite conclusion for want of local knowledge, desired that a new commission should be appointed, consisting of an equal number of commissioners, with an umpire selected by some friendly sovereign from among the most able legists in Europe, or else composed entirely of such men. It was thought that in this way impartiality, local knowledge, and high professional skill would be employed, and together bring about a settlement. Before making another reference, England desired that the United States should surrender such points of difference as the arbitrator had decided; viz., the principal question as to which was the north-westernmost head of the Connecticut, and seven subsidiary questions, which the empire determined before he gave his advice. The United States rejected the award on the subsidiary questions, but agreed to accept the decision as to the Connecticut, though not because it was bound by it,—claiming that, if part of the award was bad the whole must be bad also,—but because in this way it hoped to secure a new submission. No new commission was formed, and we must leave this question, which for nearly ten years after threatened war, and which was finally settled by the compromise of Lord Ashburton and Mr. Webster.

It is very doubtful if a new commission would have been able to settle definitely the matter in dispute; and if a compromise was to be made, it was better made by the parties. The facts as here stated have been gathered from the correspondence presented to Parliament in 1838.

* It was some years afterwards said in the House of Commons, that Her Majesty's Government accepted this award only because the United States did not; and there was probably some truth in this remark, for the demands founded on the ground that the award was final could hardly have been sincere, as we learn from a letter of Lord Palmerston, in 1835:—"You are instructed distinctly to announce to the President that the British Government withdraws its consent to accept the territorial compromise recommended by the King of the Netherlands." Here, then, the Foreign Secretary declared that the question was only whether they should accept a "territorial compromise;" and we learn from Wheaton, who was then on the Continent, that the common sentiment of Europe approved of the decision of President Jackson to treat the award as null.

United States and Mexico.

On the 11th of April, 1839, it was agreed by a convention* between the United States and Mexico, that all claims of citizens of the United States upon the government of Mexico, should be referred to four commissioners, two to be appointed by the government of each country. If the commissioners could not agree as to any claim, the parties contracted to refer their reports, with all the documents on which they were founded, to the decision of his Majesty the King of Prussia. But as the documents relating to the aforesaid claims were so voluminous that it could not be expected his Prussian Majesty would be willing or able personally to investigate them, it was agreed that he should appoint a person to act as an arbitrator in his behalf. In case the King of Prussia should refuse, provision was made for referring the claim to his Britannic Majesty, or to the King of the Netherlands.

In accordance with this convention the commissioners met at Washington in 1840,† Baron Roenne having been appointed as arbitrator by the King of Prussia. There was a delay in the organisation, because the Mexican commissioners would not take the oath as required by the United States; but this question having been arranged, the commissioners found themselves unable to agree on the formal rules of procedure. Our commissioners proposed a rule, which declared that the members of the board should consider each case, and the facts necessary to a just dicision of it, in a judical, and not in a forensic or diplomatic spirit. But the Mexicans objected, saying that such a rule was of no importance, and that the questions involved were rather those of diplomacy than justice. At length this question was found to be a question merely of words, and that each party intended to do justice at least to his own side. The Mexicans next refused to receive any claims except those which came from the United States government, maintaining that the claims were between the two governments, and that the citizens had no concern in them as to the other nation. Our commissioners tried hard to obtain the consent of the other members that the claimants might appear before them in person, but without

* U. S. Statutes at Large, Vol. VIII. p. 526.
† For full report see Sen. Doc. 1841-42, Doc. 320.

success. At last they consented that all claims coming through the Department of State should be heard ; and so in this indirect way the papers of the individual claimants were presented. These papers were submitted in Spanish and English ; and if the commissioners did not agree,—and disagreement was the rule,—all the papers, with a statement from the commissioners, went to the arbitrator. From a report of the Committee on Foreign Affairs, we learn that four months of the eighteen were spent in preliminary discussion ; that eleven claims, amounting to 439,393 dols., were allowed by the commissioners ; that the umpire upon disagreeing reports allowed fifty-one claims, amounting to 586,745 dols. When by the terms of the convention the power of the commissioners ceased, the umpire decided that his ceased also, so that there remained in his hands seventy-five claims, for the sum of 928,627 dols. Besides these, six other claims, for 3,336,837 dols., were not decided, having been presented too late to be considered by the board before its dissolution.*

To settle these unsettled claims another convention was signed at Mexico in 1843, which, having been ratified by the Senate with an amendment, was never accepted by Mexico. Moreover, the claimants to whom damages had been awarded were never satisfied, for Mexico did not pay the instalments as agreed in the treaty.

Under these circumstances a long report of the House Committee on Foreign Affairs was made, in which these unsettled claims are held up to show that Mexico did not act fairly during the convention, nor after it. As this is the only case of arbitration in our history after which came war, let there be no mistake as to the cause of the war. A House Committee reported that—

"The commissioners on the part of the United States endeavoured faithfully to discharge their duties ; and the eminent person who officiated as umpire on the part of the King of Prussia, in the still more difficult and delicate duties imposed upon him, was actuated solely by the anxious and conscientious desire to do impartial justice to the respective claimants and to the Governments of the United States and of the Mexican Republic."

Imputations were not cast upon the Mexican commissioners, for they acted under instructions. "The Mexican government were the responsible party." War then came ; not because of the arbitration, nor yet in spite of the arbitration,

* Reports of Committees, 1841-42, Doc. 1096.

but because one party did not fulfil its original agreement, and refused to enter into another to settle outstanding claims.

When the war was ended by the Treaty of Guadalupe Hidalgo, the United States undertook to satisfy all the claims of her citizens in consideration of certain territory given up by Mexico. Though the war was perhaps considered by the United States as a success, and though Mexico had not been pleased with the result of the arbitration, yet we find that at the close of the war each nation preferred to settle all difficulties that should arise between them in the future by some better method than the sword. As this is the only treaty of the kind between independent nations, we quote the twenty-first article entire.

"If unhappily any disagreement should hereafter arise between the Governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty or with respect to any other particular concerning the political or commercial relations of the two nations, the said Governments, in the name of those nations, do promise to each other that they will endeavour, in the most sincere and earnest manner to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves; using for this end mutual representations and pacific negotiation. And if by these means they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind by the one republic against the other, until the Government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighbourship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference or the circumstances of the case." *

The good faith of the parties to this contract was shown in 1853, when, there being some disagreement as to the true boundary line, a convention was at once entered into, providing that commissioners, with scientific or other assistants, such as astronomers and surveyors, should determine the true line. The difficulty that had occurred under the award of the King of the Netherlands was provided for in these words: their award shall be "considered decisive, and an integral part of this treaty, without the necessity of ulterior ratification or approval, and without room for interpretation of any kind by either of the parties contracting." In this treaty they again bound themselves to submit all questions between them to arbitration.

* U. S. Statutes at Large, Vol. IX. p. 922.

Portuguese Claims.

Portugal has not always been treated by more powerful nations as a nation their equal in right, if not in might, should be treated. The course pursued towards her by our government can perhaps be justified; but we have only space to state what it was. During the war between Portugal and Artigas, the revolutionary chief of the Banda Oriental, Portuguese commerce was much annoyed by vessels sailing under commissions issued by that commander, but fitted out in our ports. Frequent complaints were made by the Portuguese Minister. In 1820 Portugal proposed that a commission should settle the whole question; but our government said that such a proposition "would not be consistent either with the Constitution of the United States, or with any practice usual among civilised nations,"* and refused compensation, on the ground that all legal means had been used to prevent the injuries for which indemnity was asked.

In 1850, when our government was pressing Portugal to pay for the destruction of the "General Armstrong," the Artigas claims were again presented. Arbitration was again asked, and refused. Our government may have been right in refusing to pay these claims, yet we cannot but think it should have been willing to refer them to a commission.†

Case in 1814.

The case of the "General Armstrong," which was destroyed in Fayal, a port belonging to Portugal, by the British, in 1814 has hardly yet been settled. To permit one belligerent to destroy a vessel belonging to the other, is a clear breach of neutrality; and therefore the United States demanded compensation from Portugal, who refused to pay for what she could not have prevented, especially as the "General Armstrong" was said to have begun the firing.

In this way the matter rested till 1851, when, the claims‡ having been renewed, the Portuguese Government proposed to refer the question to the King of Sweden. Our Minister, Mr. Clay, refused to accede to this proposition. In reply the Portuguese Secretary entreated him to again call the attention of

* Sen. Doc. 1823-24, Vol. III. Doc. 77.
† Ex. Doc. 1851-52, Vol. VI. Doc. 53. ‡ Ibid., p. 59.

his government to the offer, "in order that the adjudication of the question may not be made a trial of physical strength between a gigantic nation and another that is so friendly and yet so incapable of resisting her." Mr. Clayton, the Secretary of State, wrote to Mr. Clay that the President sanctioned his action in refusing to arbitrate, "for reasons too obvious to need enumeration." Under such instructions, Mr. Clay again sent in his demands, with the intimation that an armed vessel was waiting to take him home if they were not complied with. Portugal then agreed to pay all claims except that of the owners of the "General Armstrong," and again begged for arbitration in that case, which involved a principle of international law, the application of which did merely regard Portugal, but all other nations. The despatch concluded with an intimation that the United States could have but little reliance on the justice of its claim. Upon this refusal Mr. Clay at once demanded his passport, which was enclosed to him, with a note, from which we quote :—"No government can pretend to infallibility in regard to its opinion ; and when a question presents itself between two friendly governments involving differences of opinion, as to points of fact and of law, it must be acknowledged that a refusal to submit the matter to arbitration, as proposed by the weaker party, is calculated to produce the impression that there are doubts as to the justice of the claims presented by the stronger."

Soon after Mr. Clay had withdrawn, President Taylor died, and Mr. Webster, becoming Secretary of State under President Fillmore, decided to accept the offer that had been made by Portugal ; and it was agreed by a convention that all the correspondence which had passed between the parties should be placed before some friendly sovereign, to whose decision the contracting parties bound themselves to submit.*

The Emperor of France, having been invited, examined the whole subject with great care and attention, and with an earnest desire to render justice to both parties according to the facts and principles involved in the controversy, and decided that the claims of the United States had no foundation, "because the collision took place in contempt of her Most Faithful Majesty's right of sovereignty, in violation of the neutrality of her territory, and without the local officers or lieutenants having

* Statutes at Large, Vol. X. p. 911.

been required in proper time, and enabled to grant aid and protection to those having a right to the same."*

A question now arose which had arisen in the case of the Mexican commissions. Is a goveanment responsible to its citizens for the claims which it attempts to settle? The owners and other claimants in the case of the "General Armstrong" now demanded that the United States should pay them the same damages as they sought from Portugal. The argument was very strongly urged, and the committees both of the House and Senate reported favourably. The demand was finally referred to the Court of Claims, where the majority of the court held that each nation must determine for itself in what way it will enforce the claims of its citizens, and, that its determination must of necessity be obligatory upon its own citizens, and especially upon such of them as might be more directly interested in its immediate action. The court further held, that, if a nation undertakes to settle claims by arbitration, it has fully discharged its obligations, and is in no way responsible to the individual for the loss that may come from an unfavourable award.

Chief-Justice Gilchrist dissented. We quote a few sentences from his opinion :—

"Where a case relating to private rights alone is submitted, it must be done with a due regard to the rights of the citizen. If his rights be disregarded and sacrificed, it is the dictate alike of law, common sense and justice that the government by which his rights have been sacrificed should make him restitution. I think it cannot be denied that, to relieve a government from liability to a citizen on this account, it would appear that the case was one proper to be submitted; that he had an opportunity of being heard before the arbitrator by arguments and proofs; that the award was certain and within the submission; and that the arbitrator did not exceed his powers."

The government must act as the agent of its citizens, but can hardly be held responsible for an adverse award.

British Claims.

All outstanding claims between our country and Great Britain, which had originated since the Treaty of Ghent, were, by a Convention in 1853, referred to a board of two commissioners. We quote from the instructions to the commissioners what was intended to prevent difficulties that had arisen under similar conventions.

* Sen. Doc. 1852-53. Vol. III. Doc. 21.

"The commissioners shall investigate and decide upon such claims in such order and in such manner as they may conjointly think proper, but upon such evidence or information only as shall be furnished by or in behalf of their respective governments in support of or in answer to any claim; and to hear, if required, one person on each side in behalf of each government, as counsel or agent for such government in each and every separate claim." *

Mr. Joshua Bates, of London was chosen umpire by agreement. No case of arbitration has ever been more successful than this. Damages were awarded in some thirty claims, amounting to about six millions of dollars.† Before this commission came the claims for slaves set free from the brig "Creole," which had been taken into Nassau by the slaves, who had forcibly got command of the vessel. This question had been the source of a long diplomatic discussion, but was now settled in our favour. The claim of the Florida bonds, the M'Leod claim and many others, which at times had threatened war between the parties, were now settled.

Darien Canal Claim.

In 1855 some trouble arose in regard to the construction of the treaty which we had entered into with Great Britain in 1850, providing for the common use of a ship-canal across the Isthmus of Darien, and that England should make treaties with certain States of South America. The English Secretary for Foreign Affairs, Lord Clarendon, desired to submit the difficulty to the arbitration of some friendly Power, and said that, when two governments disagreed about the construction of a treaty, the best and most rational mode was to refer the question to a third Power.‡ In 1856, Mr. Dallas, our Minister at London, was instructed to negotiate if he could, otherwise to make arrangements for an arbitration. The question was finally settled without the need of an arbiter, but the opinion of the President in regard to the proper person for such a position is worth quoting :—

"He (the President) would greatly prefer that, in a controversy like the present, turning on points of political geography, the matter should be referred to some one or more of those eminent men of science who do honour to the intellect of Europe and America." §

* Statutes at Large, Vol. X. p. 988.
† Sen. Doc. 1855-56, Vol. XV. Doc. 103.
‡ Sen. Doc. 1855-56, Vol. X. Doc. 35.
§ Sen. Doc. 1855-56, Vol. XIV. Doc. 82.

Case of Chili.

In 1821 some silver in coin and bars was taken by an admiral of Chili from a citizen of the United States. Our government demanded that the amount taken should be returned, with interest,—but no money came. In 1858, representatives of the two governments agreed to abide by the decision in the matter of the King of the Belgians. They invited him to decide, first, whether the claim was just in whole or in part; secondly, what sum should be paid for indemnity; and, lastly, from what date and at what rate interest should be paid. The question was settled by the arbiter, but his award has not yet been published.

Paraguay, Peru, &c., &c.

In 1859, by a convention, matters in dispute between our government and Paraguay were submitted to a commission.* An attempt was made by the claimants to get away from the award, because, by the terms of the treaty, the value of the claims, and not their justice, was submitted; but our government did not interfere.

During the year 1860 commissions were organised to settle claims between the United States and New Granada,† and between the United States and Costa Rica.

Pesident Lincoln, in 1863, proclaimed his treaties with Peru, the first submitting claims for the capture of the ships "Lizzie Thompson" and "Georgina" to the King of the Belgians, and the second referring other claims of the two nations to a commission. In 1864, the United States and Great Britain agreed to settle their claims in regard to land property in and about Puget Sound by the award of a commission. In the same year Ecuador and Colombia appointed one of their citizens to meet a citizen of the United States, who, with an umpire or arbitrator, should undertake "the mutual adjustment of claims."

All these late cases of arbitration have been carried on quietly, and to a successful conclusion. They show that our government does not hesitate to employ this agency, whether its claims are against a powerful or a weak nation. The last treaties all speak of the arbitrator or umpire, thus indicating, as

* Statutes at large, Vol. XII. p. 1087. † Ibid., p. 985.

has already been maintained, that a commission of this kind is an instance of international arbitration. The umpire in all these later commissions was appointed by some friendly power; so that a person is obtained who is not partial to either of the parties, as an umpire chosen by lot frequently is. Another provision gives the arbitrator power to decide within a certain time after the power of the commissioners has terminated.

Columbia.

At a commission, subsequently sitting in Washington, Sir Frederick Bruce acted as umpire under the treaty with Colombia; and questions, that once would have been causes of war, were settled as quietly and equitably as if they were ordinary difficulties between individuals.

Superiority of Arbitration over War.

We have now gone over most, if not all, of the instances of arbitration which have occurred in our own history. This chronicle is not only a history of, but will serve as an argument for international arbitration. We need not now show that arbitration is a common and practical method of settling international disputes, for the record has shown this. In no way can we compare arbitration and war as two means of deciding questions of right, without at once seeing how preferable is arbitration.

Mr. Gallatin, in a despatch to his government, April 18, 1827, wrote: "An umpire, whether a king or a farmer, rarely decides on strict principles of law: he has always a bias to try, if possible, to split the difference." Granting that such a bias does exist, and that the award is often what the arbitrator thinks to be a fair compromise; still this compromise is more like justice than that compromise called a treaty which comes after war. If the strength of the parties is equal, and they cease from war because they are each convinced of the other's power, no treaty can be ratified by the two nations unless it splits the difference. But nations are not often equally matched, and the treaty—the award of the arbiter, war—decides whose military power is greater, but not whose claim is more just. The weaker nation feels its weakness in arms, but trusts to the

justice of its cause ; yet history is full of the defeats of justice on the battle-field.

In the theory of international law, all nations are equal. How inconsistent it is then that war, which can only decide which is stronger, should be expected to decide what is the law ! But an award is not as often as it seems to be a compromise. Prejudice, selfishness, and national pride are but glasses which colour or distort the object. An award of an impartial person, which to the parties seems a compromise, is often strict justice, and shows that each was right and each was wrong

Nations sometimes refuse to negotiate, but are willing to abide by the decision of a third party. Before the third party has been able to give his opinion, they choose to agree in a settlement. Now, if we credit war with all the advantages which come from the treaty negotiated after the war, we ought certainly to give credit to peaceful arbitration for the settlement of all the differences which, after submission to an arbiter, are composed between nations for themselves. If this credit is given, we shall then find that arbitration has rarely failed to accomplish the desired object.

Need for Precision.

The treaty of submission should express exactly what the parties intend to submit, how far the award may go and to what extent it will be binding. A commission with an equal number of members selected by each party, and an umpire appointed by some friendly sovereign, is perhaps the best court to which nations can submit all questions as to the amount of compensation, and many minor questions of international law.

It has been the custom to refer to some friendly sovereign all matters of boundary, all interpretations of treaties, and all important questions in the law of nations. But though this has been the practice, experience has shown that a commission composed of private individuals, adapted by education and life to the settlement of such questions, would be more likely to give a just and satisfactory award. This is the case, not because kings and emperors are unjust or ignorant, but because it is very difficult, among the comparatively small number of independent sovereigns, to find one who is not in a position to feel

the consequences of his award. The fact that a king, deciding a principle of international law, must in the future himself be bound by his own decision, is, however, a very strong reason for selecting a king as sole arbiter. Though he may employ others to assist him in ascertaining the law, yet the opinion will finally come as his own.

The Portendic Claims.

No better model of submission can be found, than a treaty made by France and England to provide for the settlement of the Portendic claims. The French Government, in 1834 and 1835,* carried on war with the Trasa Moors on the coast of Portendic, where British merchants were engaged extensively in the gum trade. British vessels were seized while approaching this coast, when no blockade had been notified, and even after the French Government had declared that no blockade was intended.

As soon as the war was ended, the British Government presented the claims of her aggrieved and plundered merchants. The whole question was finally submitted to the arbitration of the King of Prussia, who was asked to decide whether any real injury was unduly inflicted on British subjects, while they were pursuing on the coast of Portendic a regular and lawful trade; and also whether France was equitably bound to pay to such or such class of the said claimants any compensation by reason of such injury. It was agreed, in the submission, that, whatever should be the decision of the arbiter, it should not be regarded as in any way affecting any of the rights which had been maintained, or any of the principles which had been asserted, by either Government, during the course of their discussion.

The award declared that the blockade was justifiable, but that all claims which rested on the want of notice of the blockade were valid. In accordance with the treaty, commissioners of liquidation were at once appointed, to whom was added an umpire, a Prussian, Baron Roenne,—the same who had acted with the commissions of the United States and Mexico. Under this commission the whole matter was settled.

* British and Foreign State Papers, Vol. XXXIV. p. 1036.

Limits of Arbitration.

Now, we do not mean to claim that arbitration can remove, or even be used to remove, all the causes of war. Public opinion and the law justify a blow given in self-defence; but the danger must not be passed, but must be imminent and present, threatening injury to one's person or property. So a nation must sometimes engage in war to protect itself from some attack threatened or already begun. No Government would ask an arbiter to decide whether or not it had a right to drive away an invading army. Such questions need immediate action, and force must be repelled by force. Civil wars cannot be prevented by arbitration, for neither party considers the other as an independent nation. The United States could not have referred to the decision of an arbiter the question of the right of secession. That question was a domestic one, and did not concern other nations; it was also a question involving our very life, and the question of right must be answered by showing that the fact was impossible. The States in rebellion had already refused to be bound by the award of congress, to whom they had agreed to submit all differences; and the army of the Union only fought to execute the award.

The United States could not consent that the King of the Netherlands should decide whether or no the Emperor of France has a right to establish Maximilian in Mexico; because our Government have believed, and still believe, that its safety depends on the enforcement of the so-called Monroe doctrine. This doctrine expresses, not what the rest of the world may think in accordance with the principles of international law, but what the United States considers to be necessary to its security and prosperity. What threatens Mexico threatens our own government; and so war, if it comes, must come in self-defence. In all these cases self-defence is the only justification for war; and the parties to a war that is begun before an attempt has been made to settle the affair by arbitration should show why such a course was necessary.

There are but few questions which arise between nations which cannot be settled by some form of arbitration. In feudal times many questions which are now settled before the courts were settled by personal conflicts. Duelling is not now recognised even as an honourable method of settling disputes between individuals; but nations still cling to the feudal idea, and

must fight for their honour. We long ago said, "Discords among nations have their origin in two sources,—opposite interests and contested rights. The first may be reconciled by the common principles of justice and mutual advantage; but where a right or a supposed right is involved in the dispute, it is then encumbered with new difficulties, because it touches the spring of national honour.* This very sensitiveness in regard to national honour, which we wrote of in 1843, has in two instances since then prevented nations from settling differences by arbitration.

The "Charles and George."

In 1857 a French vessel, the "Charles and George," having a representative of the French Government on board, sailed from France for the purpose of hiring free negroes on the coast of Africa to go and labour in provinces of France. Having obtained one hundred and ten negroes *plus ou moins librement engagés*, she went into a Portuguese port, where she was seized and condemned as good prize; and though the agent of the French Government was released, the captain of the ship was sentenced to labour in the public works, because the immigration in which the vessel was engaged was considered by the authorities of Mozambique to be really a trade in slaves.† The French captain appealed to the court at Lisbon, where he was carried with the prize. A demand was made at once by the French Government on the Government of Portugal, that the vessel and captain be given up, and indemnity be paid for the detention. Portugal tried to resist; and, invoking the article already cited, adopted at the Congress of Paris, desired that the difficulty be submitted to the arbitration of a friendly power. France refused, and Count Walewski said that the mediation proposed was inadmissible, in a question where a point of national honour was involved; and that the French Government will never consent to submit to any power whatever the question of its practising, or even tolerating, the traffic in slaves, for the presence of an agent of the French Government removed all suspicions of such crimes. Portugal was obliged to yield. After the captain and vessel were given up, France offered to submit the question of damages to arbitration; but Portugal

* North American Review, Vol. LXVI. p. 452.
† Annuaire des Deux Mondes, 1858-59, p. 355.

replied, that if the question of right, which was the only one which concerned Portugal's honour and dignity, could not be referred to an arbiter, she would not accept an award upon a mere pecuniary question.

Thus Portugal, not because she felt she was wrong, but because she knew she was weak, yielded to the demands of France, as to any other exigency. France tried to save her honour, and lost it; for she showed the spirit of a bully, and forgot that Portugal's honour was also concerned. Portugal paid the claims, but in such a way that, even if her officers were wrong in the seizure and condemnation, the very yielding as she did to necessity did her honour.

The "Alabama" Claims.

Our subsequent claims on England are too well known to need any explanation. Mr. Adams, in 1863, proposed to refer them to arbitration. Earl Russell wrote to Mr. Adams, August 30, 1865:—

"In your letter of October 23, 1863, you were pleased to say that the Government of the United States is ready to agree to any form of arbitration. Her Majesty's Government have thus been led to consider what question could be put to any sovereign or state to whom this very great power should be assigned. It appears to her Majesty's Government that there are but two questions by which the claim of compensation could be tested. The one is—Have the British Government acted with due diligence, or, in other words, with good faith and honesty, in the maintenance of the neutrality they proclaimed? The other is—Have the law officers of the crown properly understood the Foreign Enlistment Act, when they declined, in June, 1862, to advise the detention and seizure of the "Alabama," and on other occasions, when they were asked to detain other ships building or fitting in British ports? It appears to her Majesty's Government that neither of these questions could be put to a foreign Government with any regard to the dignity and character of the British crown and the British nation.

"Her Majesty's Government are the sole guardians of their own honour. They cannot admit that they have acted with bad faith in maintaining the neutrality they professed. The law officers of the crown must be held to be better interpreters of a British statute than any foreign Government can be presumed to be."

For these reasons the offer to arbitrate was declined.

President Johnson, in his first Message to the present Congress, says that the United States did not present these claims as an impeachment of the good faith of England, but as involving questions of public law, of which the settlement is essential to the peace of nations; and declares his opinion that the grounds

on which Lord Russell refuses arbitration cannot be sustained before the tribunal of nations.

What is a nation's honour, that it should fear injury from the award of an impartial arbiter? Truth, justice, and honesty to other nations and to its own citizens, are its elements. Accuse a nation of actions which imply lying, oppression, or deceit, and you bring charges against its honour. A nation's honour is the honour of its citizens, not in their private acts, nor yet exclusively in their public acts, but in all acts, whether public or private, which concern other nations. A United States gunboat takes a Confederate agent from an English mail steamer, and England's honour demands that he be restored; an English private citizen takes our prisoners from the water, and carries them to England's shore, and our honour is concerned. The moment that one nation claims and another refuses compensation, the honour of each is at stake. If the claim is just, the refusal is unjust, and *vice versâ*.

Are the acts of citizens so free from all reproach that a nation must, if called upon, defend them, and refuse to arbitrate the question in dispute, because it involves a question of the honour of a citizen, and thus of the nation that defends him? Blackstone tells us, that it was within the jurisdiction of the court of chivalry to settle points of honour between gentlemen. Nations need no such court, for arbitration affords the method of settling such questions.

An award decides that a nation was endeavouring to hold land that did not belong to it; another, that a nation must make compensation for the acts of its citizens which it once defended; another, that the claims for a long time demanded, even with the threats of war, had no foundation. When the arbiter makes known his award, the losing party performs the award, or withdraws his claim, because his honour compels him to stand by the terms of the submission. In maintaining this last point of honour, he does all that honour requires.

When, in 1817, we were endeavouring to persuade Spain to submit claims very like those since made against England, the great ground on which we urged that they might be referred to an arbitrator was, that in this way the point of honour involved could be saved.

The folly of refusing to submit a question to arbitration, simply because a question of honour is involved, will appear from comparing the position of France in 1859 with that of

England subsequently. Then France would not submit its claims to an arbiter, because the officers of Portugal had done wrong; now, England, the injuring nation will not allow our demands to be presented before a friendly sovereign because her officers have done right. If England's honour is now concerned, the honour of France was in 1819; if the honour of Portugal was involved in 1859, that of the United States is now.

That the people of the United States believe in the justice of their claims upon England is certain; and they also believe that it is for the nation's honour to submit them to arbitration.

The press of England has shown a reasonable spirit in regard to this question, certain to influence the government. The British Foreign Secretary will do well to remember and apply the words of a former Secretary, Lord Aberdeen, who, writing of the Portendic claims, said: The amicable relations of both countries, which are now endangered, would be maintained by such a settlement of the question in dispute between them, whatever might be the decision of the arbiter; and kindly feelings would take the place of that estrangement which, most unfortunately for the interest of both, the present discussion is but too well calculated to produce."

[Since the above article was written, the Joint High Commission appointed in 1871 by the two countries for the disposal of the "Alabama" and other claims, has furnished another very interesting example of the practical value of International Arbitration, as the most rational, the most economical, the most successful and the most religious mode of settling disputes.]

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